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Personnel – General

INVESTIGATING MILITARY DISCRIMINATION COMPLAINTS

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History. This printing establishes guidance for military investigators in the National Guard.

Summary. This pamphlet will assist investigators in the conduct of discrimination complaints investigations filed in accordance with NGR 600-22/ANGI 36-3. It provides models for analyses and a format for preparation of reports of investigation.

Applicability. This pamphlet applies to the Army National Guard and Air National Guard military personnel filing discrimination complaints under NGR 600-22/ANGI 36-3.

Proponent and exception authority.

NGB-EO is the proponent of this regulation. The proponent has the authority to approve exceptions to this regulation that are consistent with controlling laws, regulations and publications.

Suggested Improvements. Users are invited to send comments and suggested improvements on DA Form 2028 (Recommended Changes to Publication and Blank Forms) directly to NGB-EO, 1411 Jefferson Davis Highway, Arlington, VA 22202-3231.

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Chapter 1 Introduction

1-1. Purpose

To outline procedures for Army National Guard (ARNG) and Air National Guard (ANG) equal opportunity investigators, when conducting investigations into Title VI (military) discrimination complaints, and writing the Report of Investigation (ROI). This pamphlet should be used in conjunction with NGR 600-22/ANGI 36-3.

1-2. References

Required and related publications and prescribed and referenced forms are listed in Appendix A.

1-3. Explanation of abbreviations and terms

Abbreviations and special terms used in this pamphlet are explained in the glossary.

1-4. Overview

a. Appointment. The equal opportunity investigator is appointed by any of the following: the AG, any officer with appointing authority to support investigations, or the NGB, to conduct an investigation into allegations of discrimination. The letter of appointment should cite NGR 600-22/ANGI 36-3, Ch 3 as the authority.

b. Complaints of Discrimination. Complaints based on race, color, religion, national origin, or sex, (to include sexual harassment), prohibited by Title VI, Civil Rights Act of 1964, as amended, DOD 1350.2-D, AR 600-20, AFI 36-2706, NGR 600-21, NGR 600-22/ANGI 36-3.

c. Problem Solving. The investigator is expected to apply basic problem solving techniques and function as a fact finder. Both the complainant and the chain of command expect a thorough investigation.

Chapter 2 Preparing for the Investigation

2-1. Getting Started Before beginning any investigation, review this pamphlet and NGR 600-22/ANGI 36-3. This will help in developing an effective plan of action. See Appendix B.

2-2. Points Of Contact Before beginning this investigation, contact the State Equal Employment Manager (SEEM) to review fact-finding techniques and procedures. The SEEM, the Human Resources/Equal Opportunity (HR/EO) Officer for ARNG cases, and the Military Equal Opportunity (MEO) Officer for ANG cases, and the State Judge Advocate can serve as technical advisors to you during the course of your investigation.

2-3. The Case File Review the entire case file, ensuring that you understand the basis of the complaint (race, gender, etc.) and the specific issue(s) which originated the complaint. For example, what adverse action, or loss of benefit does the complainant claim he/she experienced, such as, not promoted, not given the opportunity for training? See paragraph 4-3 for an explanation of criteria required to establish a prima facie case of discrimination and a description of the analysis framework.

2-4. Clarifying the Issues The single most important factor in determining the success of the investigation is how clearly and concisely the specific issues in the complainant's allegations have been framed. There may be a number of allegations that all revolve around a single issue. The letter of appointment and the case file, including the formal complaint itself, (See NGR 600-22/ANGI 36-3, NGB Form 333 for sample form), will help the investigator, but further clarifying may be needed. If so, it may be necessary to meet with the SEEM, the HR/EO Officer or the MEO Officer as appropriate, and the complainant, to clarify the issues before the formal investigation begins.

a. An allegation will state a basis (race, gender, etc.), an action or omission that originated the complaint, the date, and the name of the individual(s) responsible. For example, the complainant may state: "I was discriminated against by CPT Smith on the basis of my gender (female), in that he denied me the opportunity to attend the Logistics Management Course on three different occasions, while he allowed less qualified males to attend." This is the

allegation, but what is the issue? In this example, the complainant is claiming that she is being treated differently because of her gender, defining the issue as disparate treatment. A complainant may make several allegations involving separate and distinct incidents which have originated the complaint, but all of which may revolve around one issue, such as, disparate treatment or sexual harassment.

Note: In some cases, a complainant may allege that a particular policy is discriminatory because it has a disparate impact on a particular protected group. For example, the policy itself adversely affects females more than males or Hispanics more than other race or ethnic groups. This is called institutional discrimination as opposed to personal discrimination.

b. Whoever receives the complaint, the commander, the equal opportunity representative (company or battalion level in ARNG), the equal opportunity advisor (brigade or above level in ARNG) or any military equal opportunity personnel in the ANG, should assist the complainant in clarifying the issues of the complaint using NGB Form 333. The appointing authority should consult with the SEEM to review and approve the issues to be investigated.

c. In some cases, the complainant may name a person who is simply in his/her chain of command, but was otherwise uninvolved in the action(s) in question. If the individual had no decision to make or discretion to exercise with respect to the allegation, then he/she took no action for which he/she could be held accountable. This conclusion will be noted in the ROI, include any supporting evidence used to determine the status of individuals who are named by the complainant but not involved in the action.

d. Multiple individuals may act together to commit or omit the action(s) in question, and you may have to expand your investigation accordingly.

e. Sometimes an allegation, if true, may constitute a violation of an article of the State's Code of Military Justice or state or federal criminal codes. This may be particularly true in cases of sexual harassment, where some alleged actions could be considered assault or sexual assault. If so, contact your appointing authority or servicing Judge Advocate immediately.

f. Do not combine allegations to simplify the process, but understand that multiple allegations may support a single issue. If one allegation supporting an issue is substantiated, then a finding of discrimination must be rendered on that issue. If the complainant alleges multiple issues, a finding of discrimination or no discrimination must be rendered on each issue.

g. Obtain a list of recommended witnesses from the complainant and from the agency concerning the person or persons named by the complainant as responsible for the discrimination. The list of witnesses should include the matters to which each witness will testify. Remember, this is a recommended list. You make the final determination on which witnesses you will need to interview. However, if you decide not to interview one or more witnesses on the recommended lists, you must address this in your ROI and explain your reasons for your decision (e.g. duplicative of other witness' testimony, additional character witness not needed, etc.). The SEEM will assist you in obtaining the lists of recommended witnesses.

2-5. Plan the Investigation The next most important factor in ensuring the success of your investigation is how well-organized you are before you start your on-site investigation and begin interviews. An investigation plan is a simple statement of intent which sets forth your proposed course of action. This plan can also be an ideal discussion item when seeking advice and technical support from the SEEM, SJA or other EO personnel (see NGR 600-22/ANGI 36-3, paragraph 3-3). If the appointing authority asks you for a progress report, it will be much easier to complete if you are following a plan and keeping track of the dates you complete your planned actions. A copy of your plan will be provided to the SEEM before you begin your on-site investigation. Normally, it will contain the following elements.

- a. Identity of the complainant (name, rank, unit).
- b. Basis or bases of complaint (race, gender, reprisal).
- c. Issues in complaint (What is alleged to have happened that gave rise to complaint?).
- d. Identity of the Principal Agency Witness(es) (name, rank, unit, relationship to complainant, i.e. commander, platoon sergeant, section leader).
- e. Additional information needed (documents, memoranda or other tangible evidence which may help prove or disprove allegations).
- f. Logistical support needed (e.g. private room to conduct interviews, telephone, tape recorder, etc.).
- g. Schedule of witnesses.
- h. Preliminary questions for key witnesses.

2-6. Logistics The SEEM will be your Point of Contact for all logistical support needed, including any travel arrangements and billeting requirements. You should also ensure that you obtain copies of any “tools” you may need to conduct a thorough investigation. These include (1) your letter of appointment (2) the complete case file (3) this pamphlet (4) NGR 600-22/ANGI 36-3 and (5) any other directives or regulations pertinent to the particular issues in your investigation. A tape recorder with an adequate power source and spare tapes to record your interviews is the best guarantee of the accuracy of your interviews, unless a court reporter is made available to provide a verbatim record of testimony. Label your tapes accurately and retain them until they have been transcribed. After having the tapes transcribed, the investigator may destroy the tapes. If you are traveling, arrange for a courtesy call with the commander of the installation which you will be visiting to let him/her know you are investigating an EO complaint. You will not outbrief the commander on any of your findings, nor will you share that information with anyone other than the appointing authority or personnel directly responsible for the processing of the case.

Chapter 3 Conducting the Investigation

3-1. Your Role As the investigating officer (IO), you will set the tone for your investigation. You must be courteous and professional at all times. In this regard, there are four critical rules which must be observed by all successful IOs:

a. **Always Interview the Complainant First.** This may seem obvious, but sometimes the written complaint may be so straightforward that you feel an interview would be a waste of time. It doesn't matter. You must interview the complainant first to reclarify the allegations. The complainant may give you more specific details that will help you further clarify the issues and/or provide you with information that will help you develop questions for other witnesses or identify documentation which you may need to include in your report.

b. **Do Not Take Sides.** It is sometimes easy to be co-opted by one party or the other as they attempt to “win you over” to their point of view. Regardless of your personal feelings, keep an open mind until all the evidence is in. Remember that being a good listener does not signify support. The direction of your leaning may change several times throughout an investigation. Even after you have interviewed all your witnesses and collected all your documentation, your leaning toward one conclusion or another may change once you have had an opportunity to read through and analyze the transcribed testimony and exhibits. This is why it is imperative that you not share any conclusions with anyone before you complete your report. Those conclusions may change once you have done your analysis.

c. **Investigate the Complaint, Not the Complainant.** Remember to keep your investigation focused on the allegations in the complaint and not the person making them. No matter how outlandish the accusations may seem and regardless of your personal belief in the complainant's motivation or attitude, do not allow your emotions to control your efforts. Complainants are often very frustrated and may have exaggerated their case to gain a hearing. Remember also, that the complainant perceives he/she has been treated unfairly in some way. To the complainant, that perception is their reality. Your job is to determine whether the complainant's perception is accurate or not. Focus your efforts on the nugget of truth buried beneath the surface of the complaint. Remember, too, many people will be watching you and assessing the credibility of the EO process as you go about your duties. However, if the conclusion is inescapable that the complainant has a hidden agenda, then note that fact in an observation at the end of your report, or in your analysis of the credibility of witnesses. Ensure that your observation is free of emotion and states the facts of the complainant's attitude and testimony. Your assessment of the credibility of the complainant and other witnesses is a key element in supporting your findings and must be unbiased.

d. **EO Investigations are Administrative in Nature.** The standard of proof which applies to EO investigations is proof by a preponderance of evidence. This is the yardstick which you will use throughout your investigation to determine how much evidence is enough to support or refute the allegations in the complaint. Chapter Four of this pamphlet contains an in-depth analysis of this concept. It is sufficient at this point to note that you are engaged in fact-finding rather than a judicial proceeding in which the formal rules of evidence apply. While your procedures may be more streamlined, however, remember the appointing authority may need to use your report for disciplinary action in the future.

3-2. Criminal Conduct As stated earlier, EO investigations do not normally address criminal charges. When they do, they should be referred to the appropriate criminal investigative agency for further review. Often, the criminality of a particular matter may not be apparent until after testimony has been taken and evidence collected. In other cases, the criminality of the conduct may depend on the individual's state of mind, e.g., was the conduct due to poor judgment or was it premeditated? In still other cases, the level of criminality may warrant only minor disciplinary action, and no formal criminal investigation is required. Whatever the circumstances, anytime you uncover evidence of potential criminal misconduct, contact your appointing authority, your servicing JA, and/or your IG for further guidance. As a rough rule of thumb, if you believe that you have to read someone his/her rights, you have probably crossed the threshold of a criminal investigation.

3-3. Suspicion of Criminal Conduct As previously mentioned in paragraph 2-4e, consult with your appointing authority and servicing Staff JA. Sometimes a witness will not become a suspect until after an interview has begun. If this happens, stop the interview and contact the SJA. The SJA will determine what actions to take at this time.

3-4. Evidence Evidence is simply information that tends to prove or disprove the existence of a fact. It can be written or verbal, direct or circumstantial, relevant or irrelevant, first person or hearsay, etc. All of these legal distinctions have to do with the reliability of the evidence and to what extent, if any, it should be relied upon. Keep in mind; however, you are not conducting a judicial proceeding and; if a particular fact or piece of evidence is helpful to your investigation, you may consider it. Without going into legal technicalities, it will be useful for you to know some of the distinctions.

a. **Quality of Evidence.** You should obtain evidence from all possible sources. To support NGB final decisions, the evidence collected should be material to the complaint, relevant to the issue(s) raised in the complaint, and reliable.

(1) **Material Evidence.** Evidence that relates to one or more of the issues raised in the complaint or raised by a response to the complaint. To determine whether evidence is material, you must review the allegations made, the resultant harm contained in the complaint and the response(s) to the allegations. If the evidence relates to any of these, then it relates to matters at issue and is material.

(2) **Relevant Evidence.** Evidence which tends to prove or disprove a material issue raised in a complaint. Relevancy and materiality are often used interchangeably. Generally, relevance is the more important concept in an investigation. If evidence is not relevant, whether or not it is material is of little consequence. The following question must be answered to determine relevancy: "What does this evidence tend to prove?" If the answer to the question is that it tends to prove or disprove a proposition that is related to the complaint, then the evidence is relevant.

(3) **Reliable Evidence.** Evidence is reliable if it is dependable or trustworthy. Evidence should not be ignored because it is of questionable reliability—such evidence may lead to evidence that is reliable. Some factors in determining whether a person's testimony can be considered reliable are: statements of fact versus conclusions; relationships of friendship or family between a witness and the complainant or between a witness and a person named by the complainant; a vested interest in the outcome of the complaint versus an unbiased third party witness of events.

b. **Types of Evidence.** There are many types of evidence which may be obtained on the issues raised in a discrimination complaint. Below are some examples:

(1) **Documentary Evidence.** One of the best forms of evidence is written. Assuming it is authentic, documentary evidence does not forget, does not shade the truth (usually), and will not change its mind. It may be found in reports, regulations, official and personal correspondence, handwritten notes, etc. Remember all documents are prepared by human beings and are, therefore, subject to error. There is a presumption, however, the more official the document, the less likely it will be to contain error. One way to further enhance the credibility of a document is to have it identified by its author, especially in the case of correspondence, personal notes, and computer records. This process is known as authentication and should be mentioned in your report if the document has been so verified. In fact, anytime you discuss a document during a witness interview, ensure that it is fully identified for the record to avoid confusion later on.

(2) **Computer Records.** Data contained on computer hard drives, local area networks (LANs), e-mail systems, disks, etc., are considered to be documentary in nature but pose special problems. Obtaining access to this

information can be tricky, and your Director of Information Management (DOIM) or Freedom of Information Act (FOIA) manager should always be consulted. Of course, if the information has already been retrieved, you may accept it.

(3) Testimony. Another major form of evidence is that presented by a live witness in the form of sworn testimony. Normally, the bulk of your evidence is collected in this format and, for this reason will be discussed separately in paragraph 3-4.

(4) Circumstantial. This is evidence which indirectly proves the existence of a fact. For example, if you witness A shoot B, this would be direct evidence of that event. On the other hand, if you hear a loud noise from around a corner and then observe A with a smoking gun in his hand standing over B, this would be circumstantial evidence of the event. While circumstantial evidence is perceived as less reliable than direct evidence, it can be very persuasive, as in the example above. On the other hand, using the same example, it does not rule out the possibility that B committed suicide and A rushed over to render first aid and thoughtlessly picked up the gun. Thus, you will often look for additional evidence to corroborate or support circumstantial evidence.

(5) Hearsay. Simply put, hearsay is evidence based not on a witness's personal knowledge, but on matter told to him/her by another. Hearsay testimony is allowable; however, you must determine whether it is reliable. The reason is that the best evidence of the fact asserted in the statement is a person who heard it first hand, or even better, the person who actually made the statement, if they are reasonably available and the statement is important.

(6) Direct. Direct evidence of discrimination consists of facts that reveal that intentional discrimination caused an adverse action, without referring to inference or circumstantial evidence. Direct evidence is relevant in cases involving disparate treatment, where the question is whether or not the chain of command intentionally treated members differently because of a protected factor (race, religion, gender, etc.). It is also relevant in cases involving the effect of policies where the question is whether or not the policy itself disparately treats all members of the protected class. Direct evidence is rare. The statement, "I would never place a female in that assignment," (in reference to a military position for which there is no statutory or regulatory prohibition) could be direct evidence of discrimination on the basis of gender. Direct evidence may be shown when the chain of command failed to take appropriate corrective action in situations in which it knew or reasonably should have known that practices and policies or the behavior of its members were discriminatory. Direct evidence can be in the form of a document, a statement by an official in an interview with the investigator, or the complainant's testimony of a statement made by an official in the chain of command. You should remember that, in no instance, should the failure or inability of a complainant to provide direct evidence be construed as a failure to establish a prima facie case of discrimination. In many discrimination cases, little or no direct evidence will be available.

(7) Comparative. Comparative evidence concerns evidence relating to how the complainant was treated compared with other similarly situated personnel not of the complainant's protected group. In general, similarly situated means the persons who are being compared are so situated that it is reasonable to expect that they would receive the same treatment in the context of an employment decision. It is possible that individuals may be similarly situated for one employment decision, but not for another.

Example. A Hispanic male, E-4, may be similarly situated to an Anglo male E-5 in a discrimination case involving the dispensing of non-judicial punishment. Both are subject to the same rules, are in the same unit and the same chain of command. The Hispanic specialist alleges that he was punished for an infraction, but the Anglo male who committed the exact same infraction was not punished, or was punished much less harshly. The investigator would need to determine whether or not there were other persons, not named by the complainant, but similarly situated, whose treatment could be compared to the complainant's treatment.

(8) Statistical. Statistical evidence should also be sought by the investigator in reference to the above example. For example: statistics on non-judicial punishment rendered to Hispanics versus non-Hispanics in the case of the example may either substantiate or not substantiate the allegation. Statistics may be used as evidence in allegations involving comparative treatment of groups, as in an allegation of a pattern or practice of discrimination, or the adverse effect of a policy or practice on a particular protected group. In the above example, if a statistical analysis of judicial punishment in that particular unit reflected that Hispanics made up 13% of the unit's population, but received twice as many Article 15's as any other group, would that be indicative of discrimination? It could be, but you would still need to listen to the commander's testimony and give him/her an opportunity to provide a nondiscriminatory reason for that statistic. While statistical evidence may seem to show discrimination – statistics alone do not produce a preponderance of evidence that discrimination occurred. Would it make a difference if the

commander was also Hispanic? No. If a commander holds members of his/her own race or ethnic group, or members of his/her gender to a higher standard than other members of the unit, regardless of motive; such action would be discriminatory because it subscribes to disparate treatment simply on the basis of membership in a protected group or class of persons. The SEEM can assist you in obtaining statistical data.

3-5. Testimony As mentioned earlier, most of the evidence you will collect during your investigation will be in the form of sworn testimony. Such information can be very clear or very ambiguous. Since this evidence is often based upon the recollection of human beings, it can also be incorrect. This may be due to the fact that every witness has only a part of the whole picture, forgetfulness, perception, or outright bias. And, in some cases, it may be that the witness is simply not telling the truth, even though under oath. Whatever the case, you must exercise caution and look for evidence to corroborate important statements.

a. **Witnesses.** You may encounter many types of witnesses during your investigation. Their status will determine how you are to interview them. For example, the complainant is a key witness whom you must interview first to make a final clarification of allegations and focus your investigation. The Principle Agency Witness(es) named by the complainant is equally important. Normally, they are interviewed last, or toward the end of the investigation, and given the opportunity to clarify the evidence and testimony you have collected. Often they are the only witness(es) who can supply critical information such as motive or intent. You may also have only one chance to question them meaningfully since after your interview they will have the opportunity to refine their story. An expert or professional witness is someone with special knowledge about a topic, such as a personnel specialist who might testify about the regulations governing promotion boards or separation boards or any number of personnel processes. You may need to use them as a consultant for background information on an issue in the complaint to clarify how a certain process is intended to work, or as a regular witness during your investigation. Because of their special expertise, their testimony is normally given more weight than the testimony of others in their area of specialty. You should not allow the testimony of an expert witness to control your ultimate findings and recommendations, however, since that remains your ultimate responsibility as the investigating officer. Finally, character witnesses are simply persons who can verify the reputation of a particular person for certain conduct or personality traits, i.e., honesty, violence, etc.

b. **Sworn Testimony.** Regardless of their status, all witnesses must be sworn. There are several reasons for this. First, it puts the witness on notice that your investigation is a serious matter. Second, it exposes him/her to criminal liability for failing to tell the truth which provides some guarantee of trustworthiness or truthfulness. While it would be naïve to believe that all sworn testimony is 100 percent accurate, it does allow you to base your findings and recommendations upon it with a greater degree of confidence.

(1) **Swearing a Witness.** The actual process for swearing a witness is quite simple and is included in Appendix C. As the person appointed to conduct an investigation, you are authorized to administer oaths under the authority of NGR 600-22/ANGI 36-3. [NGR(AF) 30-3]. Occasionally, a witness will be unwilling to swear but be willing to affirm to the truth of their statement. In such cases, administer the same oath, but substitute the word “affirm” for the word “swear” and delete the phrase “so help you God.” The legal effect is the same. A witness may refuse to testify only if they believe that they will incriminate themselves. Following your interview, advise the witness not to discuss their testimony with anyone outside the EO process. Tell them to contact you in the event someone attempts to discuss the investigation with them. If you discover a witness had initiated the contact, discuss the matter with their commander.

(2) **Transcription of Testimony.** There is no requirement for the witness to sign the transcribed testimony. Unless you have the support of a certified court reporter available to you during the on-site investigation, whoever transcribes the testimony of witnesses should place the following statement at the end of each witness’s testimony: “I certify the above to be true transcript of sworn (or affirmed) testimony given to me on (date) at (place).” Sign your name below this statement and add the words “Investigation Officer” below your signature. To avoid any misunderstanding, it is also helpful to state in your final report, “All witnesses interviewed during this investigation were sworn (or affirmed).” More likely than not, the transcription of testimony will take place after you have returned to your home station, and you may do it personally. Whoever does it must take great care to ensure accuracy. Since you have taped your interviews, there should be little disagreement over what was said. All testimony will be transcribed. Sworn statements of witnesses may be used as a recording method of testimony.

(3) Absent Witnesses. In case a witness is absent, you have several options. The first and best alternative is to conduct a personal interview with the witness at their location. Using this method allows you observe their demeanor/body language that can provide important clues as to their truthfulness. If this is not possible, a second alternative is to wait for them to return if their absence is only temporary, depending on the amount of time remaining to complete the investigation and the importance of that particular witness. A third alternative is to conduct a telephonic interview. This might be arranged at the local legal office where the witness is located. They may be sworn in at that location and their identity verified for the record. In cases where you have already sworn the witness, you simply remind them that they are still under oath and proceed with your additional questions. A final alternative is to mail the witness written questions (interrogatories) and have them provide a sworn, written response.

(4) Legal Representation. A related issue which arises in the rights advisement area is the question of whether or not an attorney may be present during the interview. The simple answer is that an attorney may be present only if an interviewee is suspect. Since this is beyond the scope of an administrative hearing (such as EO), no legal representative is authorized in the room during the interview. If the witness is military, and not suspect, and is the individual named by the complainant as the person responsible for the alleged discrimination, he/she may always consult with an attorney before answering questions, but may not have an attorney present during questioning.

(5) Immunity and Confidentiality. Under no circumstances will you ever grant a witness immunity from prosecution. This is not within your scope of authority as an IO. Be especially careful not to receive information “off the record” or “in confidence” or “just between you and me.” Sometimes witnesses will “open up” after the conclusion of your formal interview with them. These discussions are also on the record and may be used in the course of your investigation. In a discrimination complaint investigation, the investigator will make no promise of confidentiality.

(6) Under the provisions of, DOD Directive 1350.2, Department of Defense Military Equal Opportunity (MEO) Program, August 18, 1995, paragraph F.2.f, “when requested, the complainant should be provided a copy of the investigator’s final report, redacted as necessary to comply with the Privacy Act of 1974 (reference (k))[Section 552a of Title 5, United States Code, “The Privacy Act of 1974”] and other applicable laws and regulations.” The copy of the ROI to be provided to the complainant will be coordinated with the state’s FOIA/PA manager to ensure compliance with the Privacy Act, 5 USC 552a, and other applicable laws and regulations. The names of the witnesses will be provided to the complainant in the ROI, but personal information protected from release by the Privacy Act must be redacted (e.g., such as social security numbers, home telephone numbers and addresses). The investigator should explain that the final report will be submitted to the appointing authority, and that it will be seen by those personnel whose official duties require them access to the report, including State and NGB personnel who process, review, and adjudicate complaints of discrimination. If requested under the FOIA, only a redacted or sanitized version would be released.

3-6. Investigation Techniques Every investigation will be different and yet there are certain principles which apply to all investigations. The following IO principles should help you to organize your efforts and guide you to a successful conclusion.

a. Have a Plan. Chapter 2, paragraph 2-5, of this pamphlet recommends the creation of a plan prior to the start of your investigation. Every effective plan has a goal or objective, and in the case of a discrimination complaint, that is to prove or disprove, by a preponderance of the evidence, the allegations of the complaint. These allegations will require you to answer certain key questions about your case. They will also require you to talk to certain witnesses. In most cases, the sequence in which you talk to these witnesses is important, so plan this sequence. For example, witnesses A and B may have information that will facilitate your interview with witness C. Further, have your questions drafted in advance insofar as possible, along with alternative lines of questioning depending on the answers you receive. This branching technique keeps the interview focused and helps you retain control by maintaining momentum. Try not to ask the ultimate question, “Did you do it?” before you ask other questions which will lead naturally to the same conclusion, or will exclude, explain, or limit other possibilities. An effective plan will minimize on rambling interviews which can cause unnecessary delay when verbatim transcripts are required, as in a discrimination investigation. However, it is important to listen to the testimony and follow up on any ambiguities or inconsistencies. Finally, an effective plan will include arrangements for a private interview room, free of distractions

and in a neutral location to avoid hampering the testimony of reluctant witnesses, and sometimes even the complainant.

b. Start with the Complainant. Interviewing the complainant first is sound in principle for several reasons. First, and most importantly, it is the complainant who has generated the investigation and you need to know that you are investigating the right things. In spite of your best efforts at clarifying the issue(s), you may have misunderstood something in the original complaint, or additional allegations may have arisen since the original complaint was filed. Time spent clarifying issues at the beginning will focus your investigation and avoid wasting time. After you have clarified the issues to be investigated, ask the complainant what relief they are seeking or what action should be taken to resolve their complaint. If you discover new information that differs significantly from the original complaint, you may have to check with the appointing authority for an expansion of the scope of your investigation. As discussed below, this will often be the case where the complainant alleges a reprisal action that has taken place since the original complaint was filed. A second reason to interview the complainant first is that they will often have collected key documents and witness names that may not have been previously provided to you. This may be the kind of information that would not normally be offered freely by other witnesses in the case. This is also a good time to look for evidence that will corroborate the complainant's account of the incidents or actions which they are alleging happened. The third reason to interview the complainant first is to avoid any perception by the complainant that he/she is less important than his/her superiors or the Principle Agency Witness. This is his/her complaint and he/she needs to feel that someone is listening. This is also an ideal opportunity to meet the complainant and answer his/her questions, possibly avoiding additional complaints as you continue your investigation.

c. Finish with the Principle Agency Witness(es). A corollary to the preceding rule is that you should normally interview the named responsible person(s) at or near the end of your investigation. Again, there are several reasons for this preference. First, this interview is in many ways the most important that you will conduct. It is also the most difficult. For this reason, you should have developed all of your facts before speaking with this person. This way you can be ready with a knowledgeable series of questions which will focus on the critical issues in the case. This approach can be to the individual's benefit or detriment, but either way, is designed to elicit the truth. Another reason to interview this person last is to minimize the possibility/perception of evidence tampering, interference with other witnesses, reprisal, and structured testimony. The individual will already be aware that an investigation has been initiated and what the general allegations are. He/she has also been given the same opportunity as the complainant to provide a list of witnesses annotated with remarks about what testimony they can offer. He/she knows all that is needed to know until you are prepared for your interview.

d. Cascade Your Witnesses. Assuming that the testimony of some witness will contradict the testimony of others, you will need to find additional evidence to support one story or another. One technique to do this is to cascade or snowball your witnesses to create an expanded information pool. Ask your witnesses, "Who else was present when an incident occurred or who may have overheard the incident?" Ask who else may have had similar experiences or been in similar situations with the Principle Agency Witness since prior incidents can create an inference of a pattern or practice of a certain behavior. Another source of information can be people who overheard one of the parties discussing the incident including friends, secretaries, and coworkers. Naturally, there will be cases where there are no other witnesses. When these one-on-one situations arise, and they frequently will in cases involving sexual harassment, you will have to investigate thoroughly to corroborate the testimony you receive.

e. Look for the Best Evidence. It is often tempting to end an investigation on the basis of secondhand or indirect information. For example, statements like, "The commander told me it was OK," or, "I sent the commander a letter telling him about the problem," are statements that avoid addressing the allegation. In such cases, the best evidence is an interview with the commander or a copy of the letter in question, and you should not terminate your investigation until you have it. Often witnesses will promise to furnish information and then forget to provide it after your interview. Ensure that you make notes of these items and follow up if it's important to your case or to the credibility of the witness. Failure to provide promised information could effect the emphasis on the witness's testimony.

f. Assess Credibility/Motivation/Bias/Interest. One of the most important responsibilities of the investigator is to evaluate the reliability of evidence and testimony received. You witnessed the testimony and are in the best position to assess body language, voice inflection, and a host of interpersonal signals that a reviewer of your report will never see. Note these observations in your report and their significance in relation to your conclusions. This rule extends to observations about the witness's relationship to the case or other witnesses including the

complainant and alleged responsible person. Continually ask yourself, “What does this person stand to gain (or lose) by testifying as they have?” Be careful not to “investigate” your witness, but do focus on the facts of their testimony and their relationships with the complainant or the alleged responsible person.

g. Corroborate, Corroborate, Corroborate. Witnesses’ memories and testimonies may be inaccurate, self-serving or in conflict with statements of other parties in the case. You should always look for more information to support witness testimony and evaluate its truthfulness. This can be done through the testimony of other witnesses, documentary evidence, and the natural inferences to be elicited from them. When you have substantial agreement of the evidence on a particular point, you can begin to formulate your conclusions with greater confidence. With regard to corroboration, the creation of an evidence matrix, can help you quickly determine which evidence is corroborated and which is not (See Appendix D). Some IOs will be reluctant to seek corroboration of the testimony of officers senior to them under the theory such additional investigation is, in some way, disrespectful of their rank or position. However, while you should always observe proper military courtesy, it is important that you corroborate as many facts as possible, corroborated testimony enhances credibility. If contradictions arise, then you will have an opportunity to clarify them before embarrassing questions are asked during the review of your investigation. The thoroughness of your investigation will reflect your integrity as an investigator.

h. Create a Chronology. A complaint chronology of issues raised and actions taken in the complaint is important to analyzing your report. This single document can provide an instant overview of the sequence of events which allows you to evaluate the recollection of witnesses and put their testimony in context. See Appendix E for a sample chronology.

i. Ask for Technical/Expert Assistance. Frequently, you will be required, during the course of an investigation, to evaluate information or interpret regulations in fields outside your normal range of expertise. When this happens, do not be afraid to ask for assistance. If the question is generic, e.g., normal procedures to file a travel voucher, you can ask almost anyone with knowledge of the subject and do not need to create a witness statement. But if the questions deal with the specifics of your case, you may need to interview the expert witness and include a statement in the report. The key question is how important the technical information is to the overall conclusions in your report. If it is important, then formally interview the expert.

j. Watch for Additional Allegations. When you conduct your interviews, particularly with the complainant, and gather evidence, note additional allegations. If they are unrelated to the discrimination complaint you are investigating, discuss it with the appointing authority and ask if he/she authorizes expansion of the investigation to include the newly raised allegations. He/she may want you to mention the subject as an observation in your report, or may wish to initiate a separate investigation to deal with it. If the additional allegation is closely related to the complaint you are investigating, but was not a part of the original complaint, again, check with the appointing authority. Normally, it makes sense for you to consider it, rather than having another, separate investigation initiated. If it involves an additional issue in the complaint, or an additional basis (race, gender, etc.), have the complainant write the new allegation or basis and upon approval from the appointing authority, add to the ROI. You will also address in the ROI the fact that an additional basis or issue was given by the complainant during the investigation, approved for investigation and analyzed as part of your report.

Chapter 4 Review and Analysis

4-1. Introduction Now that you have gathered the evidence in your case, the next step is to determine what it all means. This may seem deceptively simple since you have probably already formed some preliminary conclusions about your case. This is perfectly normal unless you have such a firm, fixed view of the evidence that you cannot accept other points of view. However, be cautious about forming conclusions before you have reviewed all the evidence. Often, your conclusions may change after you have read over all the testimony. Remember many other individuals will read your report and it must stand up under some intense scrutiny. With this in mind, you must adopt a framework for analysis that forces you to consider the possibilities. Before you do that, you must be familiar with the standard of proof that will govern your conclusions.

4-2. Standard of Proof As mentioned earlier in Chapter 2, the standard of proof in EO investigations is the same as that in all administrative investigations in general: Proof by a preponderance of the evidence. EO proceedings are not

criminal trials in which the rigorous proof beyond a reasonable doubt standard would apply. Thus, the preponderance standard only requires that you are satisfied that the greater weight of the evidence supports your findings and conclusions. It means that you have determined that the evidence supporting one side in the case is more convincing than that supporting the other. Stated mathematically, you must find 51 percent of the evidence in favor of the conclusion in your report. Another formulation is that preponderance means it is more likely than not that discrimination has occurred. You should be careful, however, not to apply this standard too mechanically. Quality counts, as much as quantity, and you may choose to believe one witness rather than five if the one is of sufficient character and the five are not. Also, there is no way to measure the weight of a document against the testimony of a witness other than by applying the rules concerning credibility which have already been discussed. The bottom line is that you should not abandon your common sense or knowledge of human nature and the world when you try to determine whether or not discrimination has occurred.

4-3. Analytical Framework The model for an analytical framework in discrimination complaint cases was established in case law. Based on this law, there is an allocation of the burden of production and an order for the presentation of proof. Initially, the complainant must establish a prima facie case for discrimination. Prima facie is simply a Latin term used in law to mean “at first appearance, before investigation.” In other words, if the complainant is successful in establishing a prima facie case, there is a presumption that if the case is not rebutted, that discrimination more likely than not occurred. To establish a prima facie case, the complainant must:

- a. State a claim of discrimination based on race, color, religion, national origin, or gender (including sexual harassment).
- b. Be a member of the protected class on which the claim is based.
- c. Have suffered an adverse action, loss of benefit, disparate treatment or (as in the case of sexual harassment), a hostile work environment.
- d. Establish a causal relationship between b. and c. above, that it is because of the complainant’s membership in the protected class that he/she suffered the adverse action, loss of benefit, disparate treatment, etc. The next step is for the chain of command (the person named by the complainant) to articulate a legitimate, nondiscriminatory reason for his/her action. There is no requirement for the reason to be proven, but merely stated. In practice, however, it is wise for the chain of command to produce whatever evidence it can, either in the form of corroborative testimony or documentation, to support its articulated reason. And finally, the burden shifts back to the complainant. In order to prevail, the complainant must show, by a preponderance of the evidence, that the reasons given are pretextual to mask prohibited discrimination. You will find some models for analysis in Appendix F. Also, you will find a sample ROI in Appendix G. These should aid you in the analysis of your evidence and the writing of your report.

Chapter 5 Writing Your Report

5-1. Introduction After you have completed the investigation phase and had an opportunity to review and analyze the evidence, you are ready to write your report. Several rules apply here:

- a. Resist the natural tendency to rush into your report-writing phase until you are ready.
- b. Having invested significant time and effort to gather your facts, don’t waste them in a poorly organized report.
- c. Continually ask yourself, “What have I forgotten?” as you write your draft, then stop and collect missing data.
- d. Remember that those who read your report are limited to the facts you present, so be thorough.
- e. Address each of the allegations in the report.
- f. Finally, give the same effort to a report regardless of whether or not discrimination occurred.

5-2. Getting Started The ROI is the point at which the investigator proves his/her worth. Your investigation is a matter of serious concern to the appointing authority and the persons who might be affected by its conclusions and recommendations. This alone demands that it be impartial and complete. The report may form the basis of future policy; therefore, it must be accurate and dependable. Finally, since it may be referred to by other government agencies, its quality should be professional. Appendix G provides extensive guidance on the format for your report and matters which must be included. However, that reference is only a guide and the important thing to remember is the purpose of your report is to summarize the results of your investigation so the person who appointed you can

read the report, quickly grasp the essential facts, and arrive at a course of action or recommendation. In this regard, your ROI must be a stand-alone document. This means that all of the essential facts, documents, portions of regulations, interviews, etc., must be included in the report so that the decision maker can arrive at a determination in the case without reference to information outside the report.

5-3. Essential Requirements The essential requirements in any report, in addition to those set forth above, are:

- a. The statements and references must be correct.
- b. The subject matter must be systematically arranged.
- c. The report must be logically presented.

The importance of factual, short, and clearly stated replies to each allegation raised by the complainant cannot be overemphasized. Generalities and gratuitous information make it difficult to review and evaluate reports and often result in a request for clarification or additional information. You should cite the full name, rank and duty title of any person mentioned in the report for the first time. Whenever uncommon abbreviations or terms are used for the first time, spell them out or explain them. Avoid the use of slang, unfamiliar jargon, or obscene and profane language, unless you are quoting the exact words of another person. Be sure to clearly identify in the report the key items that influenced you, such as documents and testimony, and why you chose to believe one piece of information over another. Cite evidence in your report when completing your analysis. Coordinate your ROI with the local SJA to assess the legal implications and sufficiency of the report.

5-4. Format All ROIs will include the following elements in the order listed:

- a. Title Page.
- b. Table of Contents.
- c. Identification Page.
- d. Executive Summary.
- e. Narrative Report.
 - (1) Section I. Issues and Procedural Information.
 - (2) Section II. Review of Evidence Obtained.
 - (3) Section III. Analysis of Evidence.
 - (4) Section IV. Findings and Conclusions.
 - (5) Section V. Observations/Recommendations.

5-5. Evidence and Exhibits in the ROI List by tab number (or letter) all evidence and exhibits which provide information about the matter(s) originating the complaint, in the following order:

- a. Complainant's testimony.
- b. Testimony of witnesses for the complainant and for the chain of command.
- c. Statement of the named management official.
- d. Pertinent records, documents, memoranda, etc.
- e. Other information (i.e., organization charts, statistical data or other information regarding similarly situated persons whose treatment is subject to comparison with that of the complainant; information regarding the investigator's survey of the environment, i.e., sexual or racial jokes told frequently within the command or section might lend credence to a complainant's allegation).
- f. Attach any other items pertinent to the complaint.

5-6. Discussion and Analysis in the ROI.

- a. This is where you weigh the evidence you have gathered. In this section you should introduce your own judgment and observations, supported by documentation. Whenever you reference a particular person's testimony or other exhibits, remember to cite the reference, i.e., tab number (or letter) and page number and, if appropriate, the paragraph.
- b. Focus on the complaint, not other unrelated matters. The allegations, testimony, survey of the environment, and other documentation relating to the allegations drive this section.
- c. This section should provide the appointing authority or other reviewing officials information or explanatory comments to assist them in evaluating the evidence. Conflicting evidence should be identified and its relative

importance discussed. Your first obligation is to ensure that all evidence is presented with sufficient clarity and insight to support a just resolution of the complaint. All references to exhibits or testimony should identify tab number (or letter), page number, paragraph and line number, NGR 600-22/ANGI 36-3.

d. This section includes an analysis of the theory of discrimination you selected in conducting your fact-finding (disparate treatment, national origin, retaliation, etc.). When conducting an investigation into allegations of sexual harassment, document whether or not the harassment was quid pro quo (submission to such conduct is made explicitly or implicitly a term or condition of an individual's employment) or a hostile environment (conduct unreasonably interfering with an individual's job performance or creates an intimidating, hostile, offensive working environment).

e. Be aware of your reading audience when preparing your ROIs. Make no assumptions which cannot be supported by documented evidence. After completing your report, sign and date it. Prepare the report in original and three copies.

f. Forward all copies of the report to the SEEM. The SEEM and the SJA will review the report for administrative and legal sufficiency, NGR 600-22/ANGI 36-3, para 2-8. h.) The SEEM will coordinate with the state FOIA/PA manager to redact a copy to be provided to the complainant which complies with provisions of the Privacy Act. The SEEM will notify the investigator if any deficiencies are found in the review. If no deficiencies are found, the SEEM will forward the report to the appointing authority for final approval of the report. When the appointing authority accepts your report, your investigation is completed. You will not discuss the results of your investigation with any persons other than those whose official duties require them access to your report. Any questions you may be asked by the complainant or the named responsible official or others involved in the complaint should be referred to the SEEM, or other EO personnel, as appropriate.

5-7. Findings and Conclusions This is where the investigator determines whether discrimination did or did not occur. The findings and conclusions portion of the ROI is based on applicable case law and a preponderance of evidence. The investigator should state only the findings based on the evidence of record. The investigator must ensure that he/she does not editorialize; the findings and conclusions should be based solely on the facts developed in the record.

5-8. Observations and Recommendations. List any observations or state none. This section can include any actions taken by the command regarding this complaint. If the investigator is listing any recommendations, he/she should consult the SJA, SEEM and appointing authority to ensure that recommendations are within the scope of the findings and conclusions and are based on the "make whole" remedy theory as applied to administrative processing and adjudication of discrimination complaints.

Note: The "make whole" remedy theory as applied to administrative processing and adjudication of discrimination complaints is that the complainant should be where they would have been, absent discrimination. In other words, recommendations for firing of personnel and other adverse actions that do not remedy the discriminatory act, are not congruent with the intent of the National Guard Military Discrimination Complaint System and established case law.

Appendix A References

DOD 1350.2-D

Department of Defense Military Equal Opportunity (MEO) Program

Section I Required Publications

This sections contains no entries.

NGR 600-22/ANGI 36-3

National Guard Military Discrimination Complaint System

Section II Required Publications

Civil Rights Act of 1964, Title VI, as amended

Section III Prescribed Forms

This section has no entries.

AR 600-20 Army Command Policy

Section IV Referenced Forms

This section has no entries.

Appendix B Pre-Investigation Checklist

The purpose of this (beginning) checklist is to ensure that the investigator includes all elements of the ROI and complies with the standards prior to submission of the completed report to the appointing authority.

B-1. Has investigator been properly appointed by letter or official orders under the authority of NGR 600-22/ANGI 36-3?

B-2. Have copies of the written complaint including all documents and attachments been given to the investigator?

B-3. Has the SEEM, HR/EO, EOA or the MEO briefed the investigator on appropriate fact-finding techniques and procedures to be followed?

B-4. Have you identified all specific allegation(s) and clarified any allegations that are vague or you do not understand?

B-5. Have you identified the Principal Agency Witness(es) against whom allegations have been made?

B-6. Have you identified the type(s) of evidence that will be necessary to substantiate or disprove the allegations?

B-7. Has a plan of investigation been prepared?

B-8. Has a list of witnesses been prepared?

B-9. Has the SEEM, HR/EO, EOA or MEO assisted in preparing a list of questions? Have you developed a list of specific questions to ask each witness? [Write out the questions to be asked, in order to stay focused on the specific issue(s)]. Listen to the answers and follow up on ambiguous or unclear responses.

B-10. Have you determined the order in which witnesses will testify? Always interview the complainant first. The Principal Agency Witness should be interviewed at or near the end of the investigation. Additional witnesses may need to be called or witnesses who have already provided testimony recalled to corroborate or refute the testimony of the Principal Agency Witness.

B-11. Has the Principal Agency Witness been apprised of the allegations made against him/her?

B-12. Have arrangements been made for clerical support or a court reporter? [See NGR 600-22/ANGI 36-3, 30-3, Chap 3-5(d)]

B-13. Are copies of relevant regulations or documents available?

B-14. Have you notified the local Commander, at the location where the investigation will be conducted?

B-15. Have transportation and accommodations been made?

B-16. Have proper travel orders been prepared?

B-17. Has the supervisor of the investigator been notified of location of investigation?

B-18. Has a private office in which to conduct interviews been provided?

B-19. If interviews are to be conducted outside the workplace, explain the circumstances in the ROI.

B-20. Has the Commander provided a copy of the Reprisal Prevention Plan Checklist? (See Appendix H or NGR 600-22/ANGI 36-3, Figure 8.)

Appendix C

Investigator's Introductory Statement and Swearing of Witness

C-1. Each witness must be "Read-in" to an interview

The areas in this appendix capitalized in bold print must be read verbatim to each witness at the beginning of the interview process. The boxed areas are for the IO's information and guidance. If, during the course of an interview, evidence is produced that causes you to suspect an individual may be guilty of a crime, stop the interview.

Notes: Before interviewing a witness, make sure you have the following items:

- a. A private room to conduct the interview.
- b. A court reporter or tapes and a tape recorder with batteries (and spares) or an electrical power source and extension cord, if necessary.
- c. Copies of the Privacy Act Notice for Equal Opportunity Discrimination Complaint Investigations (See Appendix I) to provide to each witness.
- d. A list of questions to ask the witness. Prepare a list of questions prior to the interview. It is important to pose questions which require more than a "yes" or "no" answer. Remember, you may need to recall a witness after gathering more information. Do not lecture a witness. Your job is to gather facts surrounding the circumstances of the allegations put forth by the complainant.

C-2. Part 1 - Recorded Preliminary Read-In

Notes:

- a. If during an interview the IO determines he or she suspects a witness of having committed some criminal offense(s); stop the interview; no further explanation is necessary; consult with the appointing authority and SJA.
- b. Turn the recorder on. Ensure the that recorder is plugged in (or has working batteries) and a tape is loaded.

Begin here to "Read-In" the witness:

This is an official investigation concerning allegations of discrimination_____

_____.
It is being conducted at the direction of the appointing authority (state the rank and name of the appointing authority.)_____.

I want to explain some aspects of this investigation to you. As a discrimination complaint investigator I am a confidential investigator and fact-finder. My duty is to obtain information and prepare a report for use by the appointing authority or higher authority as they deem appropriate. Testimony given can be used within the Department of Defense (DoD) for official purposes. It is National Guard policy to keep such information and reports closely held. However, in some instances, there may be public disclosure of discrimination complaint investigation materials, as required by the Freedom of Information Act (FOIA), Privacy Act (PA), or as otherwise provided by law and regulations. However, any release outside the National Guard Bureau requires the approval of NGB-SDA and in such cases, release, when unavoidable, will be kept to the minimum necessary to satisfy legal requirements. No information will be released until NGB-SDA has reviewed the FOIA/PA request to determine if release is required. Do you have any questions?

During the course of the interview, I may ask you to furnish personal information about yourself. The Privacy Act of 1974 requires that I inform you of the authority for this and other required information. The statement which I am now handing you serves this purpose.

Note: Provide a copy of the Privacy Act Statement. See Appendix I, Privacy Act Statement for Equal Opportunity Discrimination Complaint Investigations.

Please read the statement at this time. (Allow the witness time to read the statement.)

Do you understand what I have said and the information on the statement? (If so, ask the witness to sign the statement and return it to you.)

Your testimony is being recorded. It will be transcribed verbatim so that a written record can be made available to the appointing authority. As a general rule, names, identifiers, and personal information about a witness are not released to the complainant or other members of the public unless the Freedom of Information Act requires disclosure.

Disclosure will occur only when the public interest in the disclosure outweighs privacy interests. Generally, this information remains protected from release outside the Department of Defense. Statements may be released within the National Guard or Department of Defense for official uses, such as resolving complaints or as required to take disciplinary action. Do you understand what I have just explained?

Are you willing to testify or to make a statement, understanding that your statement, testimony, or portions thereof, may be released outside the National Guard (if required by law) or within the Department of Defense for specific official uses?

Note: Confidentiality, you as the investigator, will make no promise or expression of confidentiality.

At this time you are not suspected of any offense under the state code of military justice, or of federal, state, or local law. Therefore, you are not authorized to have legal counsel present, and I am not advising you of the rights to which such a person is entitled. However, I am advising you now, that you may not refuse to answer any relevant and material questions that would not be self incriminating.

Note: If the witness refuses to answer questions, refer the matter to the Commander, who (upon advice of the staff judge advocate) may require the witness to answer if the objection is not valid.

Would you please rise so I may swear you in. (Rise.)

Do you solemnly swear (or affirm) that the testimony you are about to give in the matter now under investigation shall be the truth, the whole truth, and nothing but the truth, (so help you god)? (Omit words in parentheses if witness is affirming.)

C-3. Part 2 -Questioning the Witness

Note: Check the recorder and tape from time to time to ensure that recorder is operating properly and there is enough tape to complete the interview.

The time is now _____ (time) on _____ (day, month, year).

Persons present are the witness _____ (name),
the investigating officer _____ (name),
recorder (if present) _____ (name),
and any others _____ (name(s)).
we are located at _____ (location).

Having been duly advised of the nature of the investigation and sworn in we will begin questioning.

Please state your grade and full name:

Your organization:

Location of your organization:

Present duty assignment:

Question the witness using your prepared questions.

Follow-up on information raised during the interview that needs clarification.

When you have concluded, ask the following questions.

Do you have any further information, statements, or evidence which you wish to present concerning the matters we have discussed?

Do you know of anyone else who can provide further information concerning the matters we have discussed?

Conclude the Interview. It is important to “Read-Out” witnesses at the conclusion of an interview. It is imperative the witness understands to keep the interview confidential. It helps maintain the integrity of the EO system as well as help to prevent reprisal.

or the questions, answers, or discussions included in this interview with anyone except your counsel if you have one, or an equal opportunity official, unless authorized to do so by me, the appointing authority, or higher authority. If anyone should approach you regarding your testimony or the matters discussed here, you are required to report it immediately to me or _____. (State name of State Equal Employment Manager and the appointing authority).

Please be advised that at a later time it may be necessary to recall you as further information is gathered. Do you have any questions?

The time is _____. This interview is concluded. Thank you.

Appendix D Sample Evidence Matrix

Allegation	Name of Witness, Document Name, or Physical Evidence	Name of Witness, Document Name, or Physical Evidence	Name of Witness, Document Name, or Physical Evidence
Allegation 1 (brief description of allegation)	Location or tab of document or testimony in the ROI. Describe what evidence proves or disproves the allegation.	Location or tab of document or testimony in the ROI. Describe what evidence proves or disproves the allegation.	Location or tab of document or testimony in the ROI. Describe what evidence proves or disproves the allegation.
Allegation 2 (brief description of allegation)	Describe what evidence proves or disproves the allegation.	Describe what evidence proves or disproves the allegation.	Describe what evidence proves or disproves the allegation.
Allegation 3 (brief description of allegation)	Describe what evidence proves or disproves the allegation.	Describe what evidence proves or disproves the allegation.	Describe what evidence proves or disproves the allegation.
Allegation 4 (brief description of allegation)	Describe what evidence proves or disproves the allegation.	Describe what evidence proves or disproves the allegation.	Describe what evidence proves or disproves the allegation.
Allegation 5 (brief description of allegation)	Describe what evidence proves or disproves the allegation.	Describe what evidence proves or disproves the allegation.	Describe what evidence proves or disproves the allegation.
Allegation 6 (brief description of allegation)	Describe what evidence proves or disproves the allegation.	Describe what evidence proves or disproves the allegation.	Describe what evidence proves or disproves the allegation.
Allegation 7 (brief description of allegation)	Describe what evidence proves or disproves the allegation.	Describe what evidence proves or disproves the allegation.	Describe what evidence proves or disproves the allegation.
Allegation 8 (brief description of allegation)	Describe what evidence proves or disproves the allegation.	Describe what evidence proves or disproves the allegation.	Describe what evidence proves or disproves the allegation.

Appendix E**Complaint Chronology**

(Complaint Time/Event Sequence Document)

E-1. Date of alleged discriminatory event: _____*(Describe event and include other events and dates as necessary; event(s) may create separate chronology.)***E-2.** Date issue brought to the chain of command: _____*(Describe any actions and dates of actions taken by the chain of command; may create concurrent chronology based on event(s) listed above.)***E-3.** Date EO staff notified of issue: _____**E-4.** Date inquiry conducted: _____**E-5.** Date formal complaint filed: _____**E-6.** Date investigator appointed: _____**E-7.** Dates of investigation: _____**E-8.** Date ROI submitted to the appointing authority: _____**Appendix F****Models for Analysis****F-1. Model for Analysis Race, Color, National Origin, Gender***(Sexual Harassment, Retaliation and the Theory of Disparate Treatment are Listed as Separate Models for Analysis. Use this format as an aid to identify whether a prima facie case has been established for each issue and basis presented by the complainant.)***a. Prima facie case.**

- (1) The complainant is a member of a protected class _____. Yes No
- (2) The complainant was qualified to retain or obtain a suitable assignment in _____.
Yes No
- (3) The complainant was not considered for, or was considered for, but was denied an assignment in _____.
Yes No
- (4) Other personnel with similar qualifications, but who are not members of the complainant's class _____ were assigned to positions in _____ at the time the complainant's placement in such a position was denied. Yes No
- The evidence is sufficient to create an inference that the complainant's national origin _____ was the likely reason for the denial of a _____ position in _____.
Yes No

b. Rebuttal.

The _____ Army/Air National Guard provided appropriate nondiscriminatory reasons for not providing the complainant a new or continued position in _____. Yes No

c. Pretext. There is direct or circumstantial evidence that the _____ National Guard's reason for not providing the complainant a suitable position in _____ is pretextual. Yes No

d. Conclusion. Based on the foregoing, the _____ National Guard discriminated against the complainant based on his/her national origin. Yes No

**F-2. Model for Analysis – Sexual Harassment
(Prima facie case)**

- a. The complainant was a victim of a pattern or practice of sexual harassment attributable to a person or persons in the complainant's work environment.
- b. The complainant applied and was qualified for a benefit (training school, promotion) for which they were eligible and of which they had a reasonable expectation.

F-3. Model for Analysis – Sexual Harassment (Quid pro quo)**(Prima facie case)**

- a. A supervisor made sexual advances.
- b. Submission to these advances was a term or condition of employment.
- c. This fact substantially affected complainant's job or was the motivating factor in their reassignment or separation from the military.
- d. Opposite-gender soldiers were not affected in the same way by the alleged conduct.

F-4. Model for Analysis—Sexual Harassment: Job Benefits**(Prima facie case)**

- a. The complainant is a member of a protected class (male or female).
- b. The complainant was subjected to unwelcome sexual harassment.
- c. The harassment complained of was based upon gender (i.e., but for their gender, they would not have been subjected to the harassment alleged).
- d. The complainant's reaction to harassment complained of affected tangible aspects of the complainant's terms, conditions or privileges of employment.

F-5. Model for Analysis—Sexual Harassment: Hostile Working Environment**(Prima facie case)**

- a. The complainant is a member of a protected class (male or female).
- b. The complainant was subjected to unwelcome behavior of a sexual nature; unsolicited conduct regarded as undesirable or offensive.
- c. The harassment complained of was based upon gender (i.e. but for their gender, they would not have been subjected to the harassment alleged).
- d. The harassment complained of affected a term, condition or privilege of employment; and the harassment was, under the totality of the circumstances, sufficiently pervasive so as to alter the conditions of employment or establish or continue an abusive working environment.
- e. The complainant must show that the chain of command knew or should have known of the harassment in question and failed to take prompt remedial action.

F-6. Model for Analysis—Sexual Harassment: Opportunities/Benefits

- a. Prima facie case. The complainant must show that:
 - (1) Some opportunity or benefit was granted to some other individual.
 - (2) The complainant did not receive similar opportunities or benefits.
 - (3) The other person received this benefit in return for submission to the named individual's sexual advances or requests for sexual favors.

- b. Rebuttal.

What does the chain of command state as their policy on sexual harassment, its enforcement and the prompt remedial action taken to end the harassment?

or

- (1) The chain of command did not know of the harassment complained of.
- (2) What does the chain of command state as the reason(s) for withholding opportunities or benefits or for the complainant's separation?

or

- (2) The events did not take place.

or

- (2) Indirectly, by showing that they were isolated, not pervasive or genuinely trivial.

- c. Pretext.

Is there direct or circumstantial evidence that the chain of command's reasons were pretextual?

or

The chain of command should have known of the harassment and took no corrective action.

Note: A person's private and consensual sexual activities do not constitute a waiver of his or her legal protections against unwelcome and unsolicited sexual harassment.

F-7. Model for Analysis—Retaliation

a. Prima facie case.

(1) The complainant previously engaged in a protected equal opportunity activity (filed a previous informal or formal complaint of discrimination, was preparing to file such a complaint, even if it was not delivered, or in any way made a protected disclosure regarding what he/she perceived to be unlawful discrimination).

(2) The chain of command took or threatened to take an unfavorable personnel action, or withheld or threatened to withhold a favorable personnel action that disadvantaged the complainant.

(3) The official responsible for taking, withholding, or threatening the personnel action knew about the protected communication at the time the personnel action was taken against the complainant.

(4) There is a causal connection between the first two elements, in that the disadvantaging action was within such period of time of the protected activity, and in such a manner that would support an inference of retaliatory motivation if not rebutted.

b. Rebuttal. What did the responsible official state as the reason for the adverse action against the complainant?

c. Pretext.

(1) Is there direct or circumstantial evidence that the chain of command's reason for its adverse action against the complainant is pretextual?

(2) Does the preponderance of evidence establish that the personnel action was motivated by retaliation for the protected communication by the complainant, or does the preponderance of evidence establish that the personnel action would have been taken, withheld or threatened even if the protected disclosure had not been made?

F-8. Model for Analysis—Disparate Treatment

a. Prima facie case.

(1) The complainant is a member of a protected class.

(2) The complainant was treated differently from similarly situated members who were not in the complainant's protected class.

(a) Were compared members in the same chain of command as the complainant?

(b) Were compared members in the same work unit as the complainant?

or

(1) Is there direct evidence that shows discriminatory intent?

b. Rebuttal. What did the chain of command state as the reason for its treatment of the complainant and compared members?

Appendix G
Sample Report of Investigation

(Cover Page)

(STATE) ARMY / AIR NATIONAL GUARD

DISCRIMINATION COMPLAINT BY

COMPLAINANT'S NAME

NATIONAL GUARD BUREAU CASE NUMBER

Date

This is a sample only – the issues and basis of the actual complaint being investigated will determine the content of the report of investigation. The format/order of the sample report should be used to produce your actual Report of Investigation.

Table of Contents

ROI: (Rank and full name of complainant), NGB Case Number

<u>Subject</u>	<u>Page</u>
Title Page	i
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Identification page	iii
Executive Summary	1
Investigating Officer's Report	2

Narrative Report

Section I	Issues and Procedural Information	#
Section II	Review of Evidence Obtained	#
Section III	Discussion and Analysis	#
Section IV	Findings and Conclusions	#
Section V	Observations/Recommendations	#

Evidence and ExhibitsTab

Documentary Evidence	
Written Complaint	A
Memorandum Assignment of Investigator	B
Authorization Letter of Investigator	C
Records of Previous Resolution Attempts	D
Requests for Clarification of Complaint	E
Commanders Plan to Prevent Reprisal	F

Evidence and ExhibitsTab

Documents (Identify and tab separately)	G, H, etc.
Testimony (Tab each person's testimony)	I
Complainant	#
Witness(es) for Complainant	#
Witness(es) for Chain of Command	#
Responsible Official	#
Expert Witness	#

Identification Page

Note: Will be used in all military complaint cases.

Complainant's Name: (Complainant's legal name)

Position Title: (Complainant's current title or position)

Grade: (Complainant's military grade)

Guard Affiliation: (State Army/Air National Guard)

NGB Case Number: (Full NGB Case Number)

Name and Location of the Organization Involved in the Complaint:

(Complete unit designation, and address)

Issue(s) in Complaint: e.g. Non-selection of the complainant for a vacant unit position and promotion

Date(s) of the Alleged Discrimination: (day-month-year)

Kind of Discrimination Alleged: (Basis(es)): (Race, color, religion, gender, national origin, sexual harassment, or reprisal)

Relief Sought by the Complainant: (What the Complainant seeks to make whole)

Identity of Responsible Management Official: (Complete name of the person named by the complainant)

Identity of Investigator: (Full name and military address)

Date Case Received: (day-month-year)

Date Report of Investigation submitted to appointing authority: (day-month-year)

Place of Investigation: (Activity and address)

Date(s) of Investigation: (Inclusive dates)

Executive Summary

ROI: (Complainant's full name), NGB Case Number

I. Introduction

A. On (DDMMYY), *Rank, Full Name of Complainant*, complainant (CP), *unit of assignment*, filed a complaint of discrimination. The issue of his/her complaint is (*Statement of the issue(s) accepted based on the inquiry conducted IAW NGR 600-22/ANGI 36-3*) He/She has named (*name of the Responsible Management Official*). He/She alleged he/she was discriminated due to (*State the basis of the complaint race, color, creed gender, national origin, or reprisal*).

B. On (DDMMYY), CP wrote to the Chief, National Guard Bureau and alleged he/she was subject to discrimination due to *list the action(s) and/or bases*.

C. NGB-EO determined that an investigation should be conducted IAW NGR 600-22/ANGI 36-3. An investigator was appointed to conduct an investigation into the issues, and to determine the facts and circumstances which precipitated this complaint.

II. Evidence and Analysis

A. Evidence obtained during this investigation included testimony of the CP and witnesses regarding the alleged discriminatory actions by the Chain of Command, specifically the PAW, the (Title) officer, Co A, 53rd Signal Bn, .

B. Based on applicable case law, the complainant must carry the initial burden of proof, establishing a *prima facie* case of discrimination. The Agency must then articulate legitimate nondiscriminatory reason(s) for the challenged action(s). To prevail, the CP must then show by a preponderance of the evidence that the reasons are pretextual to mask prohibited discrimination.

1. The CP is a member of a protected class _____.

2. The CPs gender is _____.

C. In this case, the burdens of proof are (1) the complainant must show that she is a member of a protected class; (2) that she suffered some form of adverse employment action(s); (3) that there exists a causal connection between her membership in the protected class (basis) and the adverse employment action (issue). (4) To carry its burden, the employer must overcome allegations by articulating a legitimate, nondiscriminatory reason for action taken. (5) The complainant must then show that the articulated reason(s) given are a mask or pretext for discrimination.

D. The first burden of proof in this case rests with the CP. A *prima facie* case on the basis of race and gender was established. The CPs basis is _____. The CP alleges that: (action that harmed a term, benefit, or condition of membership) _____ *because* of their protected basis.

E. The XXARNG must articulate a legitimate, nondiscriminatory reason for its action. The management official stated the decision was based on the qualifications. A comparison was made of the candidates against the requirements of the job as stated in the position description. This comparison was based on the personnel documents of the candidates and the testimony provided by witnesses.

F. The following testimony and documents support the CP's assertion that: The comparison shows that: _____.

G. The following testimony and documents (evidence) support management's assertion of promotion based on qualifications was _____. On the other hand, there is evidence that qualifications were the sole reason for selection. An analysis of the testimony on each side indicates that:

The witnesses identified by the CP could not verify the statements the CP alleged were reported to her by these witnesses and attributed to management officials. Additionally, his perception of management requiring greater detailed explanations and justification for him, appear to be generated by a management which is seeking greater accountability of all levels of supervisors regarding proper utilization of resources. This action is to strengthen management of the entire organization and not to single out the CP. (cite Tab and page #)

H. Statistical evidence shows that (cite tab and page #) _____.

There is a preponderance of evidence that the actions reported by the CP were not _____. This evidence consists of testimony provided by _____ and additional testimony that shows that the

actions taken were consistent with regulations, directives and management initiatives. On the issue of qualifications of the candidates, the inquiry officer obtained testimony of a witness with expertise in the area of _____.

I. The witness' testimony supports that (cite Tab and page #)

_____.

The investigator interviewed witnesses identified by the complainant. The information obtained indicates that the events stated by _____. Evidence to support the CP was not sufficient because management's articulated reason for actions taken appear to be valid and not motivated by discriminatory intent and the complainant was unable to show by a preponderance of the evidence that the articulated reason was a pretext for discrimination.

III. Findings and Conclusions The CP had one issue, that she has been denied a promotion opportunity due to non selection for the position of _____. The CP cited two bases, (_____). The preponderance of evidence supports the following findings: (write findings based on evidence obtained during the course of the investigation using applicable case law to determine whether discrimination did or did not occur based on a preponderance of evidence)

Narrative Report

ROI: (Full Name of Complainant), NGB Case Number

Section I. Issues and Procedural Information

1. In the formal discrimination complaint, the complainant (CP) *Name of Complainant*, alleges discriminatory actions by management of the (State) Army National Guard, in the non-selection for a unit vacancy position authorized for, precluding her promotion to the grade of, (____) based on (protected basis) of the applicant and the selectee. He/she alleges that he/she has been subjected to discrimination because he/she was not selected, and a less qualified (race/gender) was selected.
2. The CP contacted the National Guard Bureau on (DDMMYY). He/She was advised of rights to file a complaint (tab). The investigation began on (DDMMYY). The attempts at resolution consisted of meeting with the CP and the ARNG commander and interviewing witnesses identified by the CP as having specific knowledge of the allegations, interviewing management officials in order to substantiate the claims made by the CP.

Section II. Review of Evidence Obtained

A review of the evidence obtained follows. The evidence has been organized by issue with a chronology pertaining to each issue.

1. On DD MM YY the (State) ARNG _____ for the _____ position (Tab ____). The mandatory and desirable qualifications for that position, as printed on the (Tab ____) were:
 - a. _____
 - b. _____
 - c. _____
2. Statement of (witness name) indicated that (number) individuals, (number males and number females) applied for this position (line __, Tab __, page __). All were found qualified and were referred to the selecting official.
3. The CP testified that CP first learned of non-selection when _____, (Tab ____). CP testified that (Tab ____).
4. Statistical data was obtained to show the composition of the unit and the personnel office provided numerical information concerning selections made by the selecting official (Tab ____). The data is as follows:
 - a. The percentage of women in upper level positions is % of supervisory positions, while women comprise % percent of the work force.
 - b. The percentage of blacks in upper level positions is % of supervisory positions, while blacks comprise % percent of the work force.
 - c. The organization had a stated goal to increase upward mobility opportunities for women and minorities.

d. Also, the position vacancy was restricted to members of the unit and not open to all members of the (State) ARNG.

(If more than one issue, complete Section II for each issue in the complaint)

Section III. Analysis

The CP has the ultimate burden of proving by a preponderance of evidence that she was discriminated against on the basis of race and gender, in the action that resulted in her not receiving the promotion. To establish a *prima facie* case, the CP must prove the following:

1. The CP is a member of a protected class race (African-American); and is a female.
2. CP suffered an adverse action; and
3. Others similarly situated, and not members of CP's protected group were treated more favorably than CP.
4. The (State) National Guard has the burden of providing a legitimate, nondiscriminatory reason for not selecting CP for the position.
5. The proof of the ultimate issue in this case depends on determining:
 - a. Whether CP was better qualified than the selectee.
 - b. If CP was not as qualified as the selectee.
 - c. Other.
6. Prima Facie Case. Documentary evidence obtained from the ARNG personnel office (Tab) confirms the CP was an African-American female.
7. The testimony of the selecting official (Tab ,) indicates that the reason for the selection of (name of selectee) was based on qualifications. An analysis of the qualifications of all of the candidates referred to the selecting official reveals the following:
 - a. (If a matrix was developed for selection, include in documentary evidence)
 - b. (List management's legitimate non-discriminatory reasons for the action)
8. CP offered the following reasons to support the assertion that discrimination had occurred:
 - a. (Any evidence submitted by the agency)
 - b. (Any evidence submitted by the complainant)
 - c. (Any testimony provided by the complainant or other witnesses)
9. Regarding issue number 1 or the non-selection issue, management states that:

Section IV. Findings and Conclusions: Based on applicable case and evidence obtained during the course of the investigation, no discrimination occurred based on a preponderance of evidence.

Section V. Observations/Recommendations

In the instant case, this investigator has no additional observations or recommendations to offer. All relevant matters have been addressed in the preceding sections.

Appendix H

Commander's Reprisal Plan Checklist

- H-1.** Explain reprisal and provide definition to all concerned parties (See terms NGR 600-22/ANGI 36-3).
 - H-2.** Explain Military Whistleblower's Protection (NGR 600-22/ANGI 36-3, 1-7).
 - H-3.** Explain the consequences of reprisal.
 - H-4.** Explain possible sanctions against violators.
 - H-5.** Explain the roles and responsibilities of leadership in the prevention of acts of reprisal.
 - H-6.** Explain the command's support of a thorough unbiased investigation and good faith in attempting to resolve the complaint.
 - H-7.** Explain the need to treat all parties in a professional manner both during and following the investigation.
- Name of individual counseled on reprisal _____ Commander's initials _____ Date _____.
-

[illegible]

Notes:

1. All persons involved in the filing (complainant), witnesses providing testimony, or those named as a Principle Agency Witness of an EO complaint are afforded protection against reprisal.
2. The commander will discuss reprisal prevention with all concerned individuals and annotate their name; the commander will initial and specify the date the discussion took place.
3. The commander will provide this reprisal prevention plan to the inquiry/investigating officer.

Appendix I

Privacy Act Notice for Equal Opportunity Discrimination Complaint Investigations

I-1. General This information is provided pursuant to Public Law 93-579 (Privacy Act of 1974), as amended, for individuals supplying information for inclusion in a system of records.

I-2. Authority The authority to collect the information requested by this interview is derived from one or more of the following: Title VI of the Civil Rights Act of 1964, as amended, DoDD 1350.2, AR 600-20, AFI 36-2706, NGR 600-22/ANGI 36-3.

I-3. Purpose and Uses The information you supply will be used with the information developed by investigation to resolve an Equal Opportunity Discrimination Complaint. This information may be furnished to designated officials and employees of agencies within the DOD in order to resolve the complaint. The information may also be disclosed to any agency of the State (within which the complaint is filed) or Federal Government having oversight or review authority with regard to National Guard activities.

I-4. Effects of Non-Disclosure Disclosure of information sought is voluntary; however, if you are a principal in the case, failure to respond will result in a recommended disposition of the complaint on the basis of information available.

I-5. Statement This is to acknowledge that I have read the Privacy Act Notice for Equal Opportunity Discrimination Complaints Investigations pursuant to PL 93-579 (Privacy Act of 1974), as amended, on this date: _____.

(DATE)

(Signature)

(Printed Name and Title)

Glossary**Section 1****Abbreviations****AG**

Adjutant General

AGR

Active Guard Reserve

ANG

Air National Guard

ARNG

Army National Guard

NGB-EO

Equal Opportunity

DODD

Department of Defense Directive

DOIM

Director of Information

EO

Equal opportunity (military)

HR/EOHuman Resource/Equal
Opportunity (ARNG)**HRO**

Human Resources Officer

IG

Inspector General

IO

Investigating Officer

JA

Judge Advocate

NG

National Guard

NGB-EO

Equal Opportunity, NGB

NGR

National Guard Regulation

MEO

Military Equal Opportunity

ROI

Report of investigation

SEEM

State equal employment manager

SJA

State Judge Advocate

TAG

The Adjutant General

Section II**Terms**

Basis. A reason, claimed by a complainant, for a discriminatory action; specifically, race, color, religion, gender (to include sexual harassment), national origin, or retaliation.

Case file. See official discrimination complaint case file.

Case number. A number assigned when a formal complaint is filed or when allegations of discrimination received by NGB are referred to the State National Guard. It is used by the State National Guard and NGB for statistical and identification purposes.

Claim – An assertion of an unlawful employment practice or policy for which. If proven, there is a remedy under the federal equal employment statutes.

Clear and convincing. A standard of evidence that is higher than the preponderance of evidence standard but less than the standard of beyond a reasonable doubt.

Complainant. An aggrieved present or past military personnel who are serving or have served in an inactive duty for training status, during annual training, in a full-time support status, and while in Active Guard Reserve (AGR) status or ADSW status under Title 32 U.S.C.

Complaint. One or more issues containing claims of discrimination.

Complaint case file or complaint file. See official discrimination complaint case file.

Conclusion (based on an ROI). A clear and concise statement of fact that can be readily deduced from an analysis of the evidence and the record of the case.

Discrimination. Any act or failure to act, impermissibly based solely or in part on a person's race, color, religion, gender, national origin, and sexual harassment, that adversely affects privileges, benefits, or work conditions or results in disparate treatment.

Investigation. A duly authorized, systematic, detailed examination to uncover facts and determine the truth. It is a formal process, which must produce sufficient detail to support a finding of discrimination or no discrimination. Investigations of allegations of discrimination are conducted under the authority of this procedural manual.

NGB Case Number. See case number.

Official discrimination complaint case file. A management document containing all correspondence and other documentation relating to a formal complaint and used to make recommendation and decisions regarding the complaint.

Preponderance of evidence. The standard of proof used in discrimination complaint cases. This standard requires that the findings and conclusions be supported by greater evidence than contrary findings in conclusion. That is, considering all evidence, it is more likely than not that discrimination did or did not take place. This is a lesser standard than "substantial credible evidence," or "beyond a reasonable doubt."

Resolution (of a complaint). A voluntary, written agreement between the complainant and a representative of the State National Guard which results in the settlement of the complaint to the satisfaction of both parties and terminates the administrative processing of the complaint.

Retaliation. An act of reprisal, restraint, interference, or coercion against an individual because of his or her opposition to any practice made unlawful by the status listed NGR 600-22/angi 36-3 including testifying, assisting, or participating in an inquiry or investigation

Sexual harassment. Sexual harassment is a form of gender discrimination that involved unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature when:

- a. Submission to or rejection of such conduct is made either explicitly or implicitly a term or condition of a person's job, pay, or career; or
- b. Submission to or rejection of such conduct by a person is used as a basis for career or employment decisions affecting that person; or
- c. Such conduct interferes with an individual's performance or creates an intimidating, hostile, or offensive environment.

Any person in a supervisory or command position who uses or condones implicit or explicit sexual behavior to control, influence, or affect the career, pay or job of military member or civilian employee is engaging in sexual harassment.

Similarly, any military personnel who makes deliberate or repeated unwelcome verbal comments, gestures, or physical contact of a sexual nature is also engaging in sexual harassment.